Supreme Court, U.S.
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No. 02-1003

In the Supreme Court of the United States

EAST FORD, INC.,

Petitioner,

v.

JAMES E. TAYLOR, JR.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

I. RESPONDENT DOES NOT ADDRESS THE ISSUE RAISED BY THE MISSISSIPPI SUPREME COURT'S OPINION

Respondent's Brief, while eloquent, does not address the issue. The question presented by East Ford is whether the Mississippi Supreme Court can declare an arbitration agreement unenforceable on grounds for which it would not invalidate ordinary contract provisions? This is exactly what the Mississippi Supreme Court has done. Specifically, the court stated that its decision accepted the trial court's conclusion that the differences in print on a preprinted document made the agreement unenforceable:

> As previously stated, the circuit court found in the present case that the arbitration provision appears less than one-third the size of many other terms in the document, appears in very fine print and regular type font. The circuit court further observed that all of the details concerning the vehicle Taylor purchased are in bold face print, while the arbitration provision is not. Additionally, the arbitration provision is preprinted on the document. Taking all of the foregoing into consideration, we find the arbitration clause in this case procedurally unconscionable.

East Ford, Inc. v. Taylor, 826 So. 2d 709, 715 (Miss. 2002).

Respondent's brief does not address the special consciousness requirement imposed by the Mississippi

Supreme Court or its utter disregard of the established rule of Mississippi contract law that a party which signs a contract with no effort to read it, is bound by its terms.[1] Rather, Respondent attempts to rewrite the Mississippi Supreme Court's opinion with inference and with subsequent case dicta.

Respondent is correct that the Mississippi state courts have not addressed the issue of procedural unconscionability in the arbitration context; however, the federal district courts in Mississippi, applying Mississippi substantive contract law, have rejected the procedural unconscionability argument in the context.

In *Pridgen v. Green Tree Financial Servicing Corp.*, 88 F. Supp. 2d 655 (S.D. Miss. 2000), the Plaintiff purchased a mobile home which contained an arbitration provision. The Plaintiff filed suit claiming that Green Tree had harassed him over the telephone. Green Tree moved to compel arbitration. Plaintiff argued that the clause was unconscionable because, among other reasons, the arbitration agreement was "buried" in the contract. 88 F. Supp.2d at 657. The court noted that the arbitration clause was above the space where Plaintiff signed was preceded by a warning to read the contract before signing. *Id.* Following Mississippi law, the court found no procedural unconscionability. Likewise, in the instant case the Arbitration Agreement appears in a box above Respondent's signature; Respondent admits signing the document without reading any part of the agreement; and the

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[1] Indeed, Respondent infers that a party must call special atention to an arbitration agreement before it will be enforceable. Respondent's Brief, pages.

agreement states immediately above his signature: "Do not sign if you have any questions or objections."

In *Raesly v. Grand Housing, Inc.*, 105 F. Supp. 2d 562 (S.D. Miss. 2000), the plaintiff purchased a mobile home and the agreement contained an arbitration clause. The Plaintiffs argued that

> they were hurriedly presented numerous papers, including the arbitration document, with no explanation of the terms of the agreement and the salesman telling them, 'Don't worry about it . . . It's just something the owner wants.'

105 F. Supp. 2d at 567. The Court found no procedural unconscionability because, among other reasons, the Plaintiffs did not contend they were under such pressure that would have prevented them from contracting with another party, attempting to contract more favorable terms with the mobile home dealer, or just not entering into the contract at all. In the instant case, there is no contention that Respondent was not pressured into purchasing a car from East Ford. To the contrary, he insists that he was buying the vehicle from the salesman because he was a friend. Respondent clearly could have chosen to buy a car somewhere else, not purchase a car anywhere, or negotiate more favorable terms with East Ford.

The Respondent's assertion that no one advised him of or explained the arbitration clause is irrelevant. The *Raesly* court noted that "arbitration can be enforced against a party who signs a document with or without actual awareness of the arbitration provision therein." *Id.* at 568 FN 9. This observation reflects the established rule of contract law:

> [u]nder general contract principles, a person is presumed to be aware of what he signs, absent evidence of fraud, misrepresentation or deceit in the acceptance.

Coastal Indus., Inc. v. Automatic Steam Prods. Corp., 654 F.2d 375, 380 n.8 (5th Cir. 1981) (citations omitted); Cf. *T&R Enterprises v. Continental Grain Co.*, 613 F.2d 1272, 1273 (5th Cir. 1980) (since documents were signed there was no issue as to the making of an arbitration agreement).

Smith v. Equifirst Corp., 117 F. Supp. 2d 557 (S.D. Miss. 2000), also involved Plaintiffs who claimed they did not know they were signing an agreement to arbitrate. The Court stated:

> Plaintiffs could only have been unaware that they were signing an arbitration agreement if they failed to so much as glance at the heading on the document; a failure by plaintiffs to so inform themselves of what they were signing does not make the agreement unconscionable or unenforceable.

Id. at 565. The Court granted the motion to compel arbitration.

The Taylor decision neither addresses these cases nor the basic Mississippi contract law on which they rely. Indeed, Respondent apparently concedes these principles.

II. TAYLOR CANNOT EXPAND THE QUESTION BEFORE THE COURT.

In an effort to defeat East Ford's petition, Respondent attempts to expand the question presented by arguing substantive unconscionability. This is not a basis for the Mississippi Supreme Court's opinion and is not proper on this Petition. In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 280-81 n. 10 (1993), this Court stated:

> the provision of our Rules giving respondents the right, in their brief in opposition, to restate the questions presented, Rule 24.2, does not give them the power to expand the questions presented, as the Rule itself makes clear.

506 U.S. at 280 n.10.

Respondent has included Affidavits in his Reply Brief. These should not be considered by the Court.[2] These Affidavits have no bearing on the issue of the size of the print of the Arbitration Agreement. Further, Respondent has admitted that he chose not to read the Agreement, so nothing contained in the Affidavits are relevant. Under general Mississippi contract law, absent misrepresentation, a party signing a contract without first reading the contract is bound by its terms.

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[2] There is an additional reason for the Court not to consider these Affidavits: they contain matters that would be inadmissible in evidence. When affidavits fail to meet evidentiary grounds, they must be stricken from the record. *Richardson v. APAC-Mississippi, Inc.*, 631 So. 2d 143 (Miss. 1994).

The Mississippi Supreme Court's ruling disregards *Doctor's Associates, Inc. v. Casarotto* 116 S. Ct. 1652 (1996). As the Court stated in *Doctor's Associates*,:

> [w]hat States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy unlawful, for that kind of policy would place arbitration clauses on an unequal footing, directly contrary to the Act's language and Congress's intent.

quoting Allied-Bruce Terminex Cos. V. Dobson, 513 U.S. 265, 281, 115 S. Ct. 834, 843 (1995) (Emphasis added).

CONCLUSION

Mississippi is widely known as a haven for plaintiff lawyers. The plaintiffs' bar openly despises arbitration. As one of our Mississippi Supreme Court justices stated:

> What tort reform supporters really want is for arbitration to replace people's right to sue.

Justice Chuck McRae quoted in the Clarion-Ledger Saturday, October 26, 2002. Congress passed the Federal Arbitration Act to deter the judiciary's distaste for arbitration and Petitioner respectfully requests the Court to grant its petition.

Respectfully submitted,

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